MAXWELL MUSONDA (SUING AS ADMINISTRATOR OF THE ESTATE OF FRANCIS MULENGA (DECEASED) AND ANDELA MALAMA BWALYA (SUING AS ADMINISTRATOR OF THE ESTATE OF EBO MWANGO BWALYA (DECEASED) v THE ATTORNEY-GENERAL (1988 - 1989) Z.R. 75 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BWEUPE AND CHAILA, AG. JJ.S.
9TH DECEMBER 1987AND 11TH AUGUST 1988
(S.C.Z. JUDGMENT NO. 15 OF 1988)

Flynote

Damages - Death of employed worker - Employer ceases to exist after death of worker - Future prospects of employee.
Damages - Quantum - Date of award governs calculation of the value of the kwacha.

Headnote

In this case the two deceased were killed and damages were claimed by the appellants on behalf of their estates. A year after the deaths the employing company for whom both deceased had worked was wound up. The District Registrar in assessing damages took into account that there was no evidence that other employees had found work elsewhere and made an award on the basis that as from the winding-up of the company the deceased would have been unemployed. The appellants appealed.

Held:

(i) Only in exceptional cases where a worker is employed in highly specialised work which makes it impossible for him to obtain employment elsewhere should the fact that the employer ceases to exist be taken into account.
(ii) The date of the award governs the calculation of the value of the kwacha.

Cases referred to:

(1) Litana and Chimba v The Attorney-General S.C.Z. Judgment 16 of 1987
(2) United Bus Company of Zambia Limited v Jabisa Shanzi (1977) Z.R. 397

Legislation referred to:

Fatal Accidents Acts 1846 (England)

For the appellants: L.P. Mwanawasa, Messrs Mwanawasa and Company,.
For the respondent: J.M. Mwanachongo, Senior State Advocate.

Judgment

GARDNER, AG. D.C.J.: delivered the judgment of the Court.

This is an appeal from an assessment of damages arising out of a fatal accident.

The facts of the case were that on 25th November 1981, the two deceased persons, who were both

employed by Mining Contracting Company Limited, were travelling in an ambulance along Kabwe Road when a mobile unit policeman shot them, killing them instantly.

The Attorney-General was sued in his representative capacity in respect of the negligence of the policeman. There was evidence that the first plaintiff was employed at a salary of K3,311.06n per annum and the second plaintiff at K4,805.58n per annum. There was also evidence that

at the end of 1982 the employer, Mining Contracting Company Limited, was wound up.

The learned District Registrar in assessing the damages awarded sums under the Fatal Accidents Acts on the basis that, because the deceaseds' employer, being a Limited Company, was wound up at the end of 1982, they could not have been expected to be employed thereafter. In arriving at this decision the learned District Registrar said that the type of work on which the deceased were employed was not stated and that as there was no evidence that other employees of the Mining Contracting Company Limited had obtained work elsewhere he was inclined to the view that the deceased would have been unemployed.

In addition to the award to which we have referred the learned District Registrar awarded K8,000 under the Law Reform (Miscellaneous Provisions) Act in respect of the loss of expectation of life of each deceased.

Mr *Mwanawasa* on behalf of the appellants argued that it was wrong to assume that the appellants would have been unemployed, and as the first appellant was aged thirty-nine years and the second appellant was aged forty-eight years at the time of their deaths, he asked that the full salary of each should be multiplied on a more realistic basis. He further asked for funeral expenses of K500 in respect of each deceased.

Mr *Mwanachongo* on behalf of the respondent conceded that there was evidence that the first deceased was a driver and the second deceased a machine operator, and argued that the awards should be moderate.

As to interest, Mr *Mwanawasa* asked for interest from the date of death until judgment, whilst Mr Mwanachongo argued that the learned District Registrar did not mention interest, so the matter should remain as it lay.

At first sight it would appear to be an attractive argument that where an employer has ceased to exist it makes the task of the assessing Court simple by awarding damages on the basis of expected employment only during the time of the existence of that employer. We regard this attitude as being unrealistic in the extreme. Despite the fact that there is a great deal of unemployment in this country, there is no doubt that both deceased persons were in employment at the time of their deaths and there is nothing to suggest that they were not both reliable employees who would have received good references and assistance in obtaining further employment after the dissolution of the company. Only in exceptional cases where a person is employed in highly specialised work which would make it impossible for him to obtain employment elsewhere if his employers ceased to exist,

should such a fact be taken into account. In this case therefore we agree with Mr *Mwanawasa* that the award should be calculated on the basis of a more realistic multiplier.

Mr *Mwanawasa* has argued that the multiplier in respect of the first deceased should be sixteen and in respect of the second deeased it should be seven. This would result in damages in respect of the first deceased in the sum of K52,976.96n and in respect of the second deceased K33,638.92n. We are of the view that sums awarded should be such that when invested on behalf of the dependants and expanded through the years partly as to interest and partly as to capital the resulting annual benefit should be such as to compensate the dependants for the loss of

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the support of the deceased. For these reasons, and taking into account the other matters to which we will refer to immediately hereafter, we agree with the multipliers put forward by Mr *Mwanawasa* and make awards accordingly. It is our view that these multipliers are generous and do not take into account anything which should be deducted for the living expenses for each deceased. We take this course for two reasons: one is that we note in each case that the deceased was provided with free accommodation by his employer and no claim has been made in respect of this. Secondly, in this type of case it would be proper to reduce the multiplicand to take into account the amount which will be spent on each deceased for his own maintenance had he survived. We consider, however, that it is equally proper when considering what should be a total award, to adapt the multiplier to arrive at an equally appropriate result. In this case we have arrived at what we consider to be appropriate figures by leaving the multiplicands as fixed figures and adapting the multipliers to suit the circumstances of the cases.

We take into account the fact that there has been inflation caused by the devaluation of the kwacha over the years, and the deceased persons could have been expected to earn very much more than that which they were earning at the time of their deaths. This increase in earning power is only taken into account because the award took place on 20th June 1986, some eight months after the general devaluation of the kwacha, and it is the date of the award which governs the calculation of damages.

We agree that funeral expenses should have been awarded and, in the absence of any specific objection by the learned State Advocate, we accept the figures put forward by Mr *Mwanawasa* and award K500 in each instance.

With regard to the K8,000 for loss of expectation of life in respect of each case, we would draw attention to our judgment in the case of *Litana and Chimba v The Attorney-General* (1) in which we indicated that awards under this head after the general devaluation of the kwacha in October, 1985 should be K3,000. However, there has been no cross-appeal in respect of the figures awarded by the learned District Registrar under this head so we do not intend to interfere with them. In any event these damages will of course be merged in the awards under the Fatal Accidents Acts.

We note that in this case the awards were made generally on behalf of the dependants, without specifying what sums should go to the widows and what sums should go to the children. There has been no appeal against this form of award either by the appellants or by way of cross-appeal by the

respondent. We therefore do not intend to interfere with the nature of the awards and the damages will be paid to the personal representatives of the estates of both deceased for the benefit of the dependants generally.

In view of the fact that the figures which we have indicated should be awarded are so much higher than those awarded by the learned District Registrar it follows that the original awards were totally inadequate. The appeal will therefore be allowed and the awards by the learned District Registrar are set aside. In their place we make the following awards of damages:

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First Appellant

(a) Fatal Accidents Acts Damages K52,976.97n

(b) Law Reform Act Damages (to be merged with (a)) K 8,000.00n

(c) Funeral Expenses K 500.00n

Total K53,476.97n

Second Appellant

(a) Fatal Accidents Acts Damages K33,638.92n

(b) Law Reform Act Damages (to be merged with (a))K 8,000.00n

(c) Funeral Expenses K 500.00n

Total K 34,138.92n

As to interest, although the learned District Registrar did not make any such award we consider that it is appropriate in such cases to do so unless there is something in the conduct of the parties to make it desirable to withhold interest. For the funeral expenses we award interest thereon at the rate of 7% per annum from the date of death to 2nd October 1985, and at the rate of 10% per annum thereafter until the date of this judgment. In accordance with the principles laid down in the case of *United Bus Company of Zambia Limited v Shazi* (2), we award interest on the remainder of the damages at the rate of 3.5% per annum from the date of death until 2nd October 1985, and 5.25% per annum from 3rd October 1985 until the date of this judgment.

Appeal allowed.